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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WILLIAM J. HUTCHINGS,

Petitioner,

v.

THE SUPERIOR COURT OF SAN  
DIEGO COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

D056871

(San Diego County  
Super. Ct. No. SCD208810)

PROCEEDINGS in mandate after the trial court denied defendant's *Faretta* motion (*Faretta v. California* (1975) 422 U.S. 806). Charles R. Gill, Judge. Petition granted.

FACTUAL AND PROCEDURAL BACKGROUND

The People filed charges against William J. Hutchings and others for obtaining money from owners of troubled properties for putting them into a "federal land grant

program" purported to prevent defaulted lenders from foreclosing. The second amended indictment contains one count of conspiracy, 69 counts of grand theft, 58 counts of rent-skimming and 48 counts deceptive mortgage foreclosure practices.

The case proceeded to a jury trial. On February 22, 2010, in the fourth week of what is presently estimated to be an eight-week trial, Hutchings made an oral *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118) and, during the in camera hearing, also requested that he be allowed to represent himself (*Faretta v. California, supra*, 422 U.S. 806 (*Faretta* motion)).

The court denied the *Marsden* motion, proceeded on the record with the *Faretta* motion based on a tactical dispute between Hutchings and his attorney Frank Birchak, and had Hutchings execute a *Lopez* waiver (*People v. Lopez* (1977) 71 Cal.App.3d 568). The court tentatively denied the *Faretta* motion, but allowed the parties to do further research and argue the following day.

At the hearing the next day, the prosecution argued at length that Hutchings should be allowed to represent himself. Attorney Birchak represented that, although there had been philosophical disagreements throughout the case, the issue "came to a head" the preceding day when he refused to call certain individuals on the witness list, and urged the court to grant the motion so Hutchings would not lose the ability to have witnesses testify whom he believed were crucial to his defense. Further asserting there would be no disruption, attorney Birchak pointed out that (1) his investigator would assist Hutchings; (2) Hutchings had observed counsel examine all the witnesses and has experience in accounting; (3) Hutchings was not attempting to delay the case, has not been disruptive,

and is consistently on time and present for court appearances; and (4) the only previous change of counsel occurred when Hutchings's assets were frozen. Finally, Hutchings explained to the court that, had he understood he could represent himself, he would never have brought the *Marsden* motion. He insisted that no one knows the discovery better than he, and assured the court he could step in immediately and examine the current witness as soon as the People finish their examination.

The court denied the *Faretta* motion on February 23 based on the stage of the proceedings, i.e., the jury had been selected and had already heard testimony from 40 witnesses. The court added that the tactical disagreements occurred over a significant period of time, and there was no legitimate reason for the delay in bringing the motion. Finally, the court indicated there was a potential for disruption, confusion, and prejudice, saying:

"I . . . believe that there is a significant likelihood of disruption of the trial particularly in light of the fact that the jury has [be]come accustomed to seeing Mr. Hutchings being represented by Mr. Birchak, [and] I believe that the change with Mr. Hutchings representing himself at this stage would cause confusion and potentially prejudice—though I'm not certain for whom[—]but I think it clearly rises to the potential of . . . disruption and I believe is one of the aspects associated with the *Windham* [*People v. Windham* (1977) 19 Cal.3d 121, 128] factors."

The court granted defense counsel's request for a brief recess to seek writ relief, and ordered the jury trial to resume on March 1, 2010, at 9 a.m.

Hutchings filed this petition for writ of mandate challenging the denial of his *Faretta* motion. We issued a *Palma* notice.<sup>1</sup> (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

## DISCUSSION

A defendant has a federal constitutional right to represent himself if he voluntarily and intelligently elects to do so. (*Faretta v. California, supra*, 422 U.S. at pp. 818-836.) The court has a mandatory duty to grant a request for self-representation made within a reasonable time before trial if it determines the defendant has voluntarily and intelligently elected to represent himself or herself, no matter "how unwise such a choice might appear to be." (*People v. Windham, supra*, 19 Cal.3d at p. 128.)

A request made after the defendant has proceeded to trial with counsel is another matter. While "the denial of a pretrial motion is a matter of constitutional magnitude, . . . the denial of a midtrial motion is not." (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 591.) The decision to allow self-representation midtrial rests in the sound discretion of the trial court. (*People v. Windham, supra*, 19 Cal.3d at p. 128.) Among the factors the court considers in evaluating such requests are "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*Ibid.*) Because the court has the discretion to deny the motion to prevent a defendant from "misusing the

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<sup>1</sup> We did not request a response from the People because of their unequivocal acquiescence below and the temporal urgency of the petition.

motion to unjustifiably delay trial or obstruct the orderly administration of justice" (*People v. Burton* (1989) 48 Cal.3d 843, 852), "[i]t follows ineluctably that where self-representation is requested for a legitimate reason, where there is no request for a continuance and where there is no reason to believe there would be any delay or disruption, the trial court's denial of a *Faretta* motion is an abuse of discretion." (*People v. Nicholson*, *supra*, 24 Cal.App.4th at p. 593.

The factual circumstances of this case are markedly different than those we ordinarily encounter on a *Faretta* motion. The court here conceded there was no question about the quality of attorney Birchak's performance, no history of changing counsel, and no reason to believe that Hutchings would behave in a disruptive manner. The court recognized that Hutchings had made the request because of a tactical disagreement with counsel over the selection of witnesses, he was competent to represent himself within the meaning of the law, and he was prepared to proceed. Because Hutchings had a legitimate reason to request self-representation, he was not seeking a continuance, and there is nothing in this record to indicate there would be any delay, the motion should have been granted.

It appears the reason for the denial lies in the court's oblique reference to disruption in terms of confusion and prejudice, i.e., that the jury was accustomed to seeing attorney Birchak represent Hutchings, and the change to self-representation at this juncture would cause possible confusion and raise the potential for disruption. The statement suggests a veiled concern that jurors might impute negative implications to Hutchings and the strength of his case by virtue of the attorney's withdrawal. However,

the wisdom of a defendant's decision to represent himself or herself is not directly before the court. (See *People v. Windham*, *supra*, 19 Cal.3d at p. 128.) That issue is one for the defendant and the defendant alone—and one that most courts would strongly recommend against. Attendant misgivings about confusion and prejudice can, and should, be quelled by an admonishment that the defendant has a right to represent himself, the court granted his motion for self-representation, and the jurors are not to consider or draw any inference from the fact or let it influence them in any way.

Under these circumstances, we conclude the trial court abused its discretion, and grant the petition. The combination of the lengthy trial, the hiatus to enable Hutchings to seek writ relief, and the impending resumption of the jury proceedings creates an unusual exigency that requires acceleration of the normal processes and makes a peremptory writ in the first instance proper. (Code Civ. Proc., § 1088; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223, disapproved on another ground in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 724, fn. 4; *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.)

## DISPOSITION

Let a peremptory writ issue directing the superior court to vacate its February 23, 2010, order denying the motion for self-representation and enter an order granting the motion. The opinion will be final immediately as to this court. (Cal. Rules of Court, rule 8.490(b)(3).)

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NARES, Acting P. J.

WE CONCUR:

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McINTYRE, J.

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AARON, J.